IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 20TH MARCH 2007 / 29TH PHALGUNA 1928

SA.No. 364 of 1993(B)

OS.437/1989 of MUNSIFF COURT, KAYAMKULAM
AS.13/1992 of ADDL.DISTRICT COURT-I, MAVELIKKARA
(IA 76/92)
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APPELLANTS/APPELLANTS/PLAINTIFFS:
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1. SOMALATHA ASOKAN, KANIYA PARAMBIL, CHEMPUMPURAM, NEDUMUDI.

2. SARASWATHY, KADALIVANAM, ERAVUKADU, ALAPPUZHA.

3. AMRUTHAM, KADALIVANAM, OF -DO- -DO-

4. MURUKAN, KADALIVANAM OF -DO- -DO-

BY ADV. SMT.BINDU C.G.

RESPONDENTS/RESPONDENTS/DEFENDANTS:
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1. SUKUMARAN, VANCHIYIL PUTHEN VEEDU, VALLIKUNNAM MURI, VALLIKUNNAM.

2. K.SAROJINY SUKUMARAN, KADALIVANAM, ERAVUKADU, ALAPPUZHA

RESPONDENTS 3 TO 5 ARE IMPLEADED AS THE ADDL.RESPONDENTS AS PER ORDER DT.9/11/94 ON CMP 928/93

3. VAMAKSHY, W/O.SUKUMARAN, VANCHIYIL PUTHEN VEEDU, VALLIKUNNAM MURI, VALLIKUNNAM.

4. K.M.MATHAI, KANNACKERIL HOUSE, VALLIKUNNAM MURI, VALLIKUNNAM

5. ELIZABETH, W/O.K.M.MATHAI, OF -DO- -DO-

RESPONDENTS 6 TO 9 ARE IMPLEADED AS ADDL. RESPONDENTS AS PER ORDER DT.29.3.05 IN IA 581/04

6. THANKAMMA (1ST WIFE) AGED 56 YEARS, VANCHIYIL PUTHEN VEEDU, PUTHENCHANDHA.P.O., VALLIKUNNAM MAVELIKKARA TALUK, ALAPPUZHA DISTRICT

7. CHANDRA BABU, AGED 44 YEARS, S/O.THANKAMMA AND LATE SUKUMARAN OF -DO- -DO-

8. RAJAN, AGED 30 YEARS, S/O.VAMAKSHY AND LATE SUKUMARAN OF -DO- -DO-

9. RAJU, 28 YEARS, S/O.VAMAKSHY AND LATE SUKUMARAN OF -DO- -DO-

R1 & R2 & ADDL.R3 & R4 BY ADV. SRI.V.GIRI
ADDL.R6 TO R9 BY ADV.N.RAVEENDRAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 20/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.891/93 IN SA 364/93

DISMISSED

20/3/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 364 OF 1993

Dated 20th March 2007

J U D G M E N T

Plaintiffs in O.S.437/1989 on the file of Munsiff court, Kayamkulam are appellants. Respondents are defendants. Second respondent is mother of the appellant. First respondent is her brother. Appellants filed the suit seeking redemption of Ext.A2 mortgage and partition of plaint schedule property. It was contended that appellants are co-owners along with mother second respondent and second respondent created Ext.A2 mortgage dated 16/8/1965 in favour of first respondent for a mortgage money of Rs.200/- and first respondent is in possession of property as a mortgagee and later second respondent assigned her right in favour of first respondent under Ext.B1 sale deed, so he is entitled to 1/5th right of second respondent and appellants are entitled to 4/5 shares and are entitled to redeem the mortgage and seek partition and separation of their shares. It was contended that plaint schedule property was obtained

under Ext.A1 partition deed and in spite of demand first respondent was not willing to divide the property and therefore appellants are entitled to decree sought for.

2. Second respondent mother remained ex-parte. First respondent filed written statement disputing the right of appellants and contending that appellants are not entitled to claim any share in the plaint schedule property.

3. Learned Munsiff framed necessary issues. On the side of appellants, first appellant was examined as PW1. Exts.A1 to A5 were marked. On the side of first respondent he was examined as DW1 and two witnesses were examined as Dws.2 and 3. Ext.B1 sale deed executed by second respondent was marked. Learned Munsiff on the evidence found that appellants have no right over plaint schedule property, as plaint schedule property was allotted only to second respondent under Ext.A1 partition deed and therefore appellants are not entitled to the decree sought for. Suit was dismissed. Appellants challenged the decree and judgment before Additional District court, Mavelikkara in A.S.13/1992. Appeal was filed along with I.A.76/1992, an application under Section 5 of

Limitation Act to condone the delay of 71 days according to appellants and 109 days according to first respondent. Learned District Judge dismissed the application to condone delay and consequently dismissed first appeal as barred by time. This second appeal is filed challenging dismissal of the appeal.

4. Learned counsel appearing for appellants and first respondent were heard. Arguments of learned counsel appearing for appellants was that when delay was only 71 days and it was properly explained, first appellate court should not have dismissed the application on hyper technical grounds and instead in the interest of justice appeal should have been disposed on merits of this appeal. Learned counsel appearing for appellants was also heard on merits. It was argued that plaint schedule property is ancestral property as is clear from Ext.A1 and therefore finding of learned Munsiff that appellants have no right over plaint schedule property is absolutely unsustainable and trial court should have granted a decree for redemption and partition.

5. Learned counsel appearing for first respondent argued that there is absolutely no merit

in the appeal and in the plaint itself appellant has no case that they have any subsisting right in the property and share was claimed only on the ground that under Ext.A1 partition deed plaint schedule property was allotted to second respondent mother and in law appellants are not entitled to claim share in the property allotted to the mother and therefore appeal is only to be dismissed.

6. On hearing learned counsel appearing for appellants, I do not find any substantial question of law involved in the appeal. Suit is filed for redemption and partition contending that appellants are co-owners along with second respondent who created Ext.A2 mortgage in favour of first respondent her brother and later assigned the right of equity of redemption under Ext.B1 to the mortgage and first respondent has only the 1/5 share of second respondent and appellants have $4/5^{th}$ share and it is to be separated. As rightly found by courts below Ext.A1 partition deed does not establish that children of second respondent have any right over plaint schedule property. Ext.A1 shows that partition was entered into dividing the properties therein between the father and children of second respondent.

The properties so divided acquired and derived by the father. Ext.A1 does not establish that children of second respondent have any right over the properties so divided. Properties allotted to the share of second respondent under Ext.A1 is not for and on behalf of appellants. There is no case in the plaint that it is the ancestral property as claimed by learned counsel appearing for appellants. There was also no case that it was thavazhy properties or appellants are Marumakathayees. There was also no case that appellants by their birth derived right over the properties divided under Ext.A1. In such circumstances, learned Munsiff rightly found that appellants who are children of second respondent cannot claim any right over the plaint schedule property, when the mother is alive. In such circumstances, I do not find any reason to interfere with the dismissal of first appeal by learned District Judge even though dismissal was not on merits.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.364 OF 1993

20th March 2007

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